

FINAL DRAFT

Pacific Northwest Regional Agreement

Between the

**Environmental Protection Agency,
National Marine Fisheries Service, and
Fish and Wildlife Service**

Regarding

**Enhanced Coordination under
Environmental Protection Statutes Administered by the EPA
and the Endangered Species Act**

October 24, 2001

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I. Purpose of the Pacific Northwest Regional Agreement

This agreement is intended to clarify and supplement the January 2001 National Memorandum of Agreement Between the Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) Regarding Enhanced Coordination under the Clean Water Act and Endangered Species Act (National MOA). The National MOA (section V.A.4) encourages development of sub-agreements to step down national direction and carry out regional implementation. This agreement is in part a sub-agreement to the National MOA. The purpose of the National MOA is to:

(1) improve coordination of the agencies' compliance with the Endangered Species Act (ESA) for actions authorized, funded, or carried out by EPA under section 303(c) and 402 of the Clean Water Act (CWA), and (2) to provide clear and efficient mechanisms for improved interagency cooperation, thereby enhancing protection and promoting the recovery of threatened and endangered species and their supporting ecosystems, and reducing the need for future listing actions under the ESA.

This agreement builds on and augments the National MOA by: (1) defining interagency regional teams with specific roles and responsibilities; (2) initiating the development of regional guidance to improve the ESA section 7(a)(2) consultation process for EPA actions; (3) providing strategic direction for consultations and coordination in the areas of water quality standards and NPDES permits; (4) adding provisions to address enhanced coordination regarding Total Daily Maximum Loads (TMDLs) under section 303(d) of the CWA; (5) adding provisions to address enhanced coordination regarding the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) and the ESA; and (6) establishing a budget initiative to fund this work and the establishment of annual implementation plans. This agreement applies to coordination between EPA, NMFS, and USFWS in the states of Oregon, Washington, and Idaho (herein referred to as the Northwest)

II. Goals and Objectives of the Pacific Northwest Regional Agreement

There are nine goals and objectives identified in section II of the National MOA that are also the goals of this agreement. In addition, in 1997, Regional Executives of EPA and the Services agreed that their agencies would coordinate and collaborate on responsibilities for implementing the CWA and the ESA. To guide this effort, the Regional Executives endorsed the following goals for integrating the two laws: (1) maximize aquatic habitat conservation and watershed recovery by combining the authorities of both acts; (2) create "one-stop shopping" to the greatest extent possible for land owners and the regulated community to meet CWA and ESA requirements; and (3) make the most efficient use of our respective agency resources through effective partnerships. Also, in the sections that follow, there are specific objectives identified for those sections. These additional objectives are intended to supplement and/or further define the goals and objectives in the National MOA.

III. Funding and Additional Staff

Existing EPA and Services resources and staff are sufficient to fully support a fraction of the required consultations and coordination activities described in this agreement. This agreement is intended to maximize our efficiency and effectiveness in addressing the current workload but a substantial increase in resources is clearly needed to fully implement this agreement and meet our responsibilities under the ESA. The Senior Management team and the Regional Executives, with support from the Regional Coordinating team will actively seek additional resources to complete required consultations and implement this agreement.

IV. Pacific Northwest Interagency Teams

The National MOA lays out a general team framework to, among other things: (1) conduct joint planning and prioritization of workloads; (2) develop processes to reduce the impacts of proposed agency actions and streamline work activities; and (3) resolve disputes quickly through an elevation process (see National MOA section V.A.1-4). These are also key objectives of the team approach in the Northwest. In addition, a key objective of this agreement is to emphasize early project coordination to ensure actions minimize/avoid adverse effects on threatened and endangered species and their critical habitat, which will enable more consultations to be completed informally (i.e. concluded with concurrence letters as oppose to the issuance of biological opinions).

Below is a description of the five types of teams that will implement interagency coordination in the Northwest. The roles and responsibilities of each team are described, and are consistent with the Team concept in the National MOA. This agreement outlines five distinct teams: (1) Project Teams (program and technical staff); (2) State-Based Management Teams (Field Supervisor/EPA State Operations Office Directors); (3) Regional Coordinating Team (senior policy staff); (4) Senior Management Team (Assistant Regional Executives/EPA Office Directors); and (5) Regional Executive Team. The Regional Coordinating team will track membership for each of the teams annually and revise appropriately.

Technical/Project Teams: A standing technical team with a representative from each agency will be established for each state. The function of these technical teams will be to assist project teams described below in the BE/BA and Opinion development process. They will review each BE/BA and Opinion to ensure consistency and will provide preliminary agreement on the effects determinations. For each project (e.g. consultation or coordination) the State-Based Management team will assign appropriate field or program staff from each agency. Project teams will:

- (a) review actions during early development stages, identify opportunities to benefit listed species and their habitat, and ways to reduce/avoid adverse effects;
- (b) lead the development of biological evaluations/assessments (BE/BA) and biological opinions (Opinions) in consultation with the technical teams and, where appropriate, develop and carry out third party contracts;

- (c) identify and agree on information needs and the scale of BE/BAs;
- (d) review and provide preliminary agreement on effects determinations;
- (e) promptly elevate disagreements to the State-Based Management Team;
- (f) monitor implementation of reasonable and prudent measures and terms and conditions in Opinions;
- (g) work to integrate the CWA and the ESA to protect water quality and aquatic habitat for coordination projects that do not involve CWA section 7 consultation.

State-Based Management Teams: One State-Based Management team will be formed for each state and will consist of NMFS and FWS field office supervisors and EPA operation office directors or their designees. The teams will be supported by members on the Regional Coordinating team and others as needed to fulfill the teams duties, such as EPA unit managers and NMFS and FWS field office team leaders. The duties and responsibilities of the State-Based Management teams are to:

- (a) assess the potential workload in their respective state and develop a work plan to allocate staff and funding to address the state workload;
- (b) assign project and technical team members and ensure they have adequate resources and time to complete their duties;
- (c) identify time frames for completing projects and monitor performance of project teams;
- (d) resolve project team disagreements or promptly elevate disagreements to the Senior Management team or Regional Executive team;
- (e) meet at least semi-annually to carry-out the teams duties in addition to frequent e-mail and voice communication.

Regional Coordinating Team: The Northwest will have one Regional Coordinating team and will consist of senior policy staff, regional program supervisors, or their designees. The purpose of this team is to:

- (a) draft regional policy, guidance, and overall consultation strategies and priorities;
- (b) draft an annual regional implementation plan, which incorporates the state-specific work plans, and distribute the approved plan to affected EPA and Service offices and personnel;
- (c) support State-Based Management teams in setting priorities and resolving disputes;
- (d) help elevate and frame elevated disputes to the Senior Management and/or the Regional Executive teams;
- (e) train agency personnel on the provisions in the National MOA and this agreement;
- (f) maintain and distribute a list of the team members on the various teams.

Senior Management Team: The Northwest will have one Senior Management team which will consist of Assistant Regional Executives/EPA Office Directors. The purpose of this team is to:

- (a) approve regional policy, guidance, consultation strategies/priorities, and the annual implementation plan developed by the Regional Coordinating team;
- (b) resolve disputes elevated by the State-Based Management team or promptly elevate unresolved issues to the Regional Executive team; and
- (c) work to obtain adequate funding/staffing to implement the National MOA and this agreement.

Regional Executive Team: The Northwest will have one Regional Executive team (comprised of Regional Executives from each agency). Their primary function is to:

- (a) approve interagency agreements and policies appropriate for this level of signature;
- (b) resolve disputes that are elevated by the Senior Management team,
- (c) elevate unresolved issues for Headquarters review, and work to secure adequate funding and staffing to implement the National MOA and this agreement.

Section V.A.2 of the National MOA describes the elevation process for elevating disputes including a description of Level 1 and Level 2 review. For the regional teams described above, the Project teams and the State-Based Management teams function as the Level 1 review and the Senior Management team and the Regional Executives function as the Level 2 review. In practice, we expect the Project teams to quickly raise unresolved issues to the State-Based Management teams. If issues cannot be resolved here, we expect the Senior Management team to resolve most unresolved disputes. In rare circumstances, the Regional Executives may be called on to resolve disputes. The Senior Management team will seek to quickly identify those issue that will need to be resolved by the Regional Executives.

V. Coordination with States and Tribes

While States and Tribes play a critical role in administering and implementing the CWA and other EPA statutes, they are not signatories to the National MOA or this agreement, which addresses EPA's and the Service's responsibility under section 7 of the ESA. EPA and the Services, however, view effective collaboration with States and Tribes critical to the success of this agreement. Thus, as described in various sections in the National MOA (Guiding Principles, V.A.1.h., VIII.A., IX), EPA and the Service will actively work with State and Tribes at all levels when conducting the coordination and consultation activities described in this agreement that affect them. Specifically, the project teams and the State-Based Management teams will work closely with affected State and Tribal staff and management in fulfilling their respective teams responsibilities. The Regional Coordination team, Senior Management team, and Regional

Executives will work closely with their respective State and Tribal counterparts while completing their team responsibilities.

VI. Development of Regional Consultation Guidance

EPA and the Services agree to develop regional consultation guidance to: (1) resolve disputes and differences in interpretation of issues that commonly arise in regional EPA consultations; (2) improve our joint understanding of information requirements necessary to complete the consultation process; and (3) improve the clarity, conciseness, and transferability (across geographic areas) of biological evaluations, concurrence letters, and Opinions.

This guidance will be developed by the Regional Coordinating team with support from the technical team members. This guidance will be in easy to read question and answer form for agency staff to readily understand and apply. The guidance will be used along with the Service's 1998 Consultation Handbook, but will address issues specific to EPA programs. Examples of key issues could include, but are not limited to: interpretation of best available information, appropriate environmental baseline descriptions for different types of EPA actions, and an operational definition of "more than minor detrimental effects."

VII. Regional CWA-ESA Priorities & Efficiencies

EPA and the Services recognize interagency consultation responsibilities for any action that may affect listed species or designated critical habitat. EPA and the Services also recognize, however, the need to establish mutual consultation priorities and schedules to ensure that limited agency resources are dedicated first to the highest priority work.

At the Regional level, the agencies agree on the follow priority scheme:

1. *Completion of section 7 WQS consultations, with particular emphasis on the aquatic life criteria and the mixing zone portions of State and Tribal standards, is the top near-term CWA-ESA priority.* The rationale for this is that aquatic life criteria are the water quality targets and are the basis for NPDES permits, TMDLs, and other CWA programs. Thus, ensuring that aquatic life criteria avoid or minimize adverse effects on listed species and their critical habitat would provide a foundation to ensure that other CWA programs dependent on aquatic life criteria will also conserve listed species and their habitat.
2. *State-based management teams will collaborate on other may affect actions/programs and allocate staffing and funding appropriately.* The State-based management teams will assess the upcoming workload for each state and determine which activities or programs warrant the greatest level of staff attention.

To maximize our collective resources and avoid duplication of work, information, analysis, and conclusions from previously completed consultations will be used, as appropriate, for other approval actions throughout the Northwest. At the start of a consultation on an approval action, the Project team will examine all past consultations (National and in the Northwest) to determine if an *analogous consultation* already exists. An *analogous consultation* is an action that analyzes the effects of an identical contaminant on similar species under comparable environmental circumstances. Information from *analogous consultations* should be referenced in BEs and Opinions.

Additionally, methods that have been used elsewhere to streamline/reduce the consultation workload and that should also be considered include: (1) reduce impacts from proposed actions to avoid adverse effects on listed species and critical habitat; (2) group or batch similar “may affect” actions; (3) identify opportunities for programmatic consultations; (4) share staff resources; (5) explore third party contracts; (6) and identify other work-saving options within the bounds of law and regulations.

VIII. Water Quality Standards

A. Objectives

In addition to the goals and objectives of the National MOA, this agreement identifies the following additional objective for Water Quality Standards and the ESA:

1. Work with States and Tribes to revise existing WQS and adopt new WQS so that WQS avoid or minimize adverse effects to listed species or critical habitat and contribute to the conservation of listed species

B. General Agreements

In addition to WQS agreements outlined in the National MOA (section VIII), EPA and the Services agree to the following in the Northwest:

1. Complete State and Tribal WQS consultations in the Northwest that collectively address all the aquatic life criteria. As described in section VI.C of the National MOA, EPA and the Services will defer to the aquatic life criteria national consultation process to avoid duplication of work at the regional level when completion of the national consultation on a particular aquatic life criteria is expected in the near term (1-2 years).
2. Other WQS actions that the State-Based Management Teams will appropriately allocate staff and funding resources under Section VII.2. include: beneficial use designations (describing where and when aquatic life criteria apply); mixing zone, variance, and antidegradation policies; use-attainability determinations, and human health criteria. In the future, when the above consultations are completed, EPA

and the Services will focus more on working with the States and Tribes to develop *new* aquatic life, habitat, sediment, and wildlife criteria.

3. EPA and the Services will emphasize early coordination with States and Tribes during revisions of existing standards and development of new standards during the triennial review process and seek to develop WQS that avoid adverse affects. The National MOA (section VII. A) describes a process to begin consultation prior to the State or Tribe adopting a WQS. Consistent with that process, EPA and the Services in the Pacific Northwest will seek to provide the State or Tribe a preliminary effects determination on the proposed State or Tribal WQS by the end of the State or Tribe's public comment period on the proposal. To facilitate this, EPA will seek to provide the proposed WQS and a preliminary effects determination to the Services one month prior to end of the State or Tribes public comment period. The Services will seek to provide preliminary agreement/non-agreement with EPA's preliminary effects determination by the end of the public comment period. If the Project Team anticipates the final WQS may adversely affect listed species or critical habitat, EPA will seek to provide the Services a final BE/BA 45 days prior to the expected date of the State or Tribal submission to EPA for approval. When EPA provides the BE/BA in advance as described above, the Services will work to complete the Opinion within the 60 day time frame for EPA approval.

4. Information from completed consultations will be used to evaluate existing State and Tribal water quality standards that were previously approved by EPA, but did not undergo ESA consultation (e.g. prior to species listings). After a State or Tribal water quality standard is determined to adversely affect listed or proposed species, EPA Region 10 and the Services will recommend that other Northwest States and Tribes with a similar or less protective standard and species presence appropriately revise their standard to avoid or minimize any adverse effects.

IX. NPDES Permits

A. Objectives

In addition to the goals and objectives in the National MOA (see sections II and IX), objectives of this agreement for NPDES Permits and the ESA section are to:

1. Ensure that NPDES permits avoid or minimize a) adverse affects on listed species or critical habitat for EPA-issued permits, and b) more than minor detrimental effects on listed species or critical habitat for State/Tribal issued permits;

2. Develop a streamlined process to provide NPDES permit holders and State and Tribal permit issuers certainty their CWA permit meets ESA requirements while allowing EPA and States/Tribes to issue permits in a timely manner.

B. General Agreements

In addition to NPDES agreements outlined in the National MOA (section IX), EPA and Services agree to the following in the Northwest:

1. EPA-issued permits are actions that the State-Based Management teams will appropriately allocate staff and funding resources to under Section VII.2.
2. State and Tribal-issued NPDES permits are actions the State-Based Management teams will appropriately allocate staff and funding resources to under Section VII.2. The Services will review selected State and Tribal-issued NPDES permits following the procedures described in the National MOA. In summary, the Services and EPA will review early draft permits and work with the State or Tribe to ensure the permit is not likely to have more than minor detrimental effects on listed species or critical habitat. If the Services determine that the final draft of the permit is still likely to have more than minor detrimental effects, the Service will indicate this to EPA and the State or Tribe. EPA then may choose to object to the permit. If EPA chooses to object and the State or Tribe does not adequately address EPA's objections, EPA will use its authority under the CWA to federalize the permit and consult with the Services.
3. EPA and the Services will work with NPDES delegated States and Tribes to develop a strategy to ensure that State and Tribal-issued permits meet ESA requirements, including development of a mechanism to appropriately authorize incidental take that has been minimized.
4. In general, NPDES permit provisions that conform with WQS levels that have been determined to not adversely affect listed species or critical habitat in an analogous consultation will be viewed as not likely to adversely affect listed species (See Section VII for definition of analogous consultation). Likewise, NPDES permit provisions that are at WQS levels determined to adversely affect listed species or critical habitat in an analogous consultation will generally be viewed as having an adverse effect. For NPDES permits, Project Teams should consider whether the use of mixing zones, variances or other factors support the use of an analogous consultation. If there has been no previous consultation on the applicable WQS in the permit, then the ESA review will assess the effects of that permit discharge in the vicinity of the discharge, including assessment of pollutants that may affect listed species but for which the State has not adopted aquatic life criteria. Where an EPA-issued permit is likely to adversely affect listed species or critical habitat, EPA will appropriately use all its authorities under the CWA to minimize those adverse effects on listed species.

X. TMDLs and Related Implementation Measures

The National MOA does not specifically address section 303(d) of the CWA, so this part of the regional agreement goes beyond the National MOA. The National MOA, however, does indicate the team approach and elevation procedure will be applied for all consultations on EPA actions related to the CWA (section V.A.2.). In the Northwest, TMDLs projects will also be part of the team approach described in this agreement.

A. Objectives

In addition to the goals and objectives of the National MOA (section II), objectives regarding TMDLs and related implementation measures are as follows:

1. Ensure that TMDLs avoid or minimize adverse effects to listed species or critical habitat and contribute to the conservation of listed species.
2. Create efficient opportunities for land owners and state programs to simultaneously meet TMDL and ESA requirements.
3. Use our authorities under the CWA and the ESA to foster the development of federal, state, local, and private management programs and practices (particularly practices that contribute to non-point pollution and habitat degradation) that attain WQS and conserve listed species and critical habitat.

B. General Agreements

1. EPA's approval of TMDLs are actions the State-Based Management Teams will appropriately allocate staff and funding resources under Section VII.2. EPA and the Services recognize the large potential workload associated with TMDL consultations and that EPA has limited authority in TMDL approvals (i.e. EPA approval is limited to the TMDL allocations and does not include approval of implementation measures). Given this, EPA and the Services agree, where appropriate, to develop streamlined strategies as described in Section VII for TMDL consultations.
2. EPA and the Services agree that TMDLs and TMDL implementation measures in particular can play an important role in the conservation and recovery of listed species. Thus, EPA and the Services will coordinate review and comment on the sufficiency of selected TMDL implementation plans to meet WQS and conservation needs for listed species. The number of implementation plans reviewed by the Services is subject to available resources and will be determined by the State-Based Management teams. TMDL implementation plan approval under existing EPA rules, however, is not part of EPA's TMDL approval action and any associated consultation.

3. EPA and the Services will work to ensure that water quality issues are addressed in appropriate Service-approved section 10 Habitat Conservation Plans (HCPs), state and local plans to meet the limits described in ESA 4(d) rules, and section 7 biological opinions for federal resource agency actions (e.g. Forest Service, BLM, Army Corps). HCPs, state and local ESA 4(d) plans, and federal resource agency actions are likely to be important measures to meet TMDLs.

4. Where appropriate, EPA and the Services will continue to encourage land owners to do combined section 10 HCPs and TMDLs as described in our joint draft guidance issued August 16, 1999. In this case, the HCP functions as the TMDL implementation plan. Although this approach provides the most comprehensive ESA and CWA coverage, EPA and the Services recognize it is most applicable for large landowners where the HCP and TMDL geographic scope are the same. EPA and the Services will examine other mechanisms to provide ESA coverage for TMDL implementation plans. Although TMDL implementation plans are not part of EPA's TMDL approval action (under existing rules), there still may be other mechanisms (ESA section 7 under another CWA authority or ESA section 4(d)) that could provide land owners legal coverage under the ESA.

XI. Other CWA Programs

There are other EPA actions under the CWA that may affect listed species or critical habitat and require consultation under the ESA. The Regional Coordinating team will evaluate these other CWA actions and develop strategies to address them, if necessary. As previously mentioned, the National MOA indicates the team approach and elevation procedure will be applied for all consultations on EPA actions related to the CWA (section V.A.2.). Thus, the team approach described in this agreement will be applied to any of these other CWA actions that may arise. State Based Management teams will appropriately allocate staff and funding to consultations on other CWA actions as indicated in Section VII.2.

XII. CERCLA, RCRA and Other EPA Programs

The National MOA does not address CERCLA or RCRA, so this part of the regional agreement goes beyond the National MOA. EPA and the Services agree to apply the team approach described in this agreement to consultations on EPA actions under CERCLA and RCRA. As necessary, all the teams described in Section IV will be augmented with EPA CERCLA and RCRA staff. The State-Based Management teams will consider CERCLA and RCRA actions along with evaluating and prioritizing CWA workloads. The Regional Coordinating team will develop a more detailed framework for addressing CERCLA and RCRA actions and amend this agreement appropriately.

XIII. Annual Implementation Plans

Each year, the Regional Coordinating team, in consultation with the State-based management teams, will draft an annual regional implementation plan describing the specific actions to implement this agreement during the following year. The Senior Management team will approve the annual implementation plans.

XIV. Amendments to the Agreement

This agreement may be modified by mutual consent at any time. The Regional Coordination team will draft any modifications to the agreement, which will be approved by the Regional Executives. Any party may withdraw from the agreement at any time with a written notice from their Regional Executive to the other Regional Executives.

XV. Disclaimers

The statutory provisions and regulations described in this document contain legally binding requirements. This document does not substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally binding requirements on the agencies or any other party, and may not apply to a particular situation based upon the circumstances. The agencies retain the discretion to adopt approaches on a case-by-case basis that differ from this agreement where determined to be appropriate based upon the facts of a particular case and applicable legal requirements. Therefore, interested parties are free to raise questions and objections about the substance of this agreement and the appropriateness of its application to a particular situation. This guidance is a living document and may be revised periodically without public notice. The agencies welcome public comments on this document at any time and will consider those comments in any future revision of the agreement.

Nothing in this agreement shall be construed as obligating any of the parties to the expenditure of funds in excess of appropriations authorized by law or otherwise commit any of the agencies to actions for which it lacks statutory authority.

XVI. Signatures

John Iani, Regional Administrator
U.S. Environmental Protection Agency
Region 10

Date

Anne Badgley, Regional Director
U.S. Fish and Wildlife Service
Region 1

Date

Robert Lohn, Regional Administrator
National Marine Fisheries Service
Northwest Region

Date